



January 9, 2002

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West 7th Street
Austin, Texas 78701-2981

OR2002-0160

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157077.

The University of Texas System (the "university") received a request for "employment history and background check information, positions and dates of employment with UTPD, any complaints or recommendations filed by UTPD staff members or other UT staff members and any instances of paid or unpaid leaves of absence" for seven named university police department officers. You inform us that the university has conferred with the requestor who has agreed to withdraw a request for medical or benefit related information contained within the personnel files of officers, and that the university will withhold as non-responsive certain information relating to medical history, including reported injuries, routine immunizations, and medical reimbursement. You claim that portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.102, 552.108, 552.115, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We first note that section 552.117(2) of the Government Code excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, and information that reveals whether a peace officer has family members, regardless of whether the peace officer complies with section 552.024 of the Government Code. We agree that the university must withhold the information it has marked in the submitted Tab 4, as well as in Tab 7, pertaining to an officer's home address, home telephone number, social security number, and family information, under section 552.117(2). See Open Records Decision No. 670 (2001) (providing that a governmental body may withhold information under section 552.117(2) without requesting a decision from this office). We have marked additional information that must be withheld under section 552.117(2).

We also note that Tab 4 contains photographs of peace officers. Section 552.119 excepts from public disclosure a photograph of a peace officer² that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). The submitted copies of photographs depict peace officers and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officers have executed any written consents to disclosure. Thus, you must withhold the photographs depicting peace officers contained in Tab 4.

Tab 4 also contains a driver's license number. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license number contained in Tab 4 under section 552.130. However, the accident report in Tab 6 is confidential under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is

²"Peace officer" is defined by article 2.12 of the Code of Criminal Procedure.

protected by other statutes. Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. The Seventy-seventh Legislature amended section 550.065(c)(4) to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. See Act of May 22, 2001, 77th Leg., R.S., H.B. 1544, § 5 (to be codified at Transp. Code § 550.065(c)(4)). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has not provided the department with two of the three pieces of information. Thus, you must withhold the entire accident report in Tab 6 under section 550.065(b).

You argue that some of the information contained in the personnel files of the named individuals, representative samples of which you have submitted as Tabs 5 and 7, is excepted from disclosure under section 552.101 in conjunction with common-law privacy and under section 552.102. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

This office has held that personal financial information not related to a financial transaction between an individual and a governmental body is protected by common law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). On the other hand, a public employee's job performance does not generally constitute his private affairs. Open Records Decision No. 470 (1987). The public has a genuine interest in information concerning a public employee's job performance and the reasons for dismissal, demotion or promotion. Open Records Decision No. 444 at 5-6 (1986). In addition, the public has a legitimate interest in the job qualifications, including college transcripts, of public employees.

ORD 470. We find that a portion of the information within the submitted documents is protected by common-law privacy, and must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. We have marked the information that is private.

You claim that certain criminal history record information ("CHRI") in Tab 7 is also excepted from disclosure pursuant to section 552.101 of the Government Code. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. *See* Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *See id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). The definition of CHRI does not include driving history record information maintained by the department under Subchapter C of Chapter 521 of the Transportation Code. After reviewing the submitted information in Tab 7, we conclude that some of the information is CHRI. We have marked the information that you must withhold pursuant to section 552.101.

The information contained in Tab 8 relates to a complaint of alleged sexual harassment against an officer. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

You do not indicate that a summary of the investigation has been released. Therefore, based on *Ellen*, the university must withhold the identity of the victim as you have marked from the documents submitted in Tab 8.

We also note that Tab 9 contains an employee W-4 form. Employee W-4 forms are made confidential by section 6103(a) of title 26 of the United States Code, *see* Open Records Decision No. 600 (1992), and therefore, they are excepted from disclosure under

section 552.101. We have marked an additional document in Tab 9 that is excepted from disclosure under section 552.101 in conjunction with common-law privacy.

Further, you assert that a copy of a birth certificate in Tab 10 is excepted under section 552.115 of the Government Code. Birth or death records maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official are excepted from required public disclosure under section 552.115. However, since the birth certificate at issue does not appear to be held by the bureau of vital statistics or local registration officials, section 552.115 is inapplicable. You must, however, withhold the marked information in the birth certificates under section 552.117(2) of the Government Code.

You also claim that the information submitted in Tab 11 is excepted from disclosure under section 552.108 of the Government Code. Section 552.108, the "law enforcement exception," provides in relevant part that "an internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain, if the responsive information does not do so on its face, how and why section 552.108 is applicable. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). In this instance, you inform us that the information submitted as Tab 11 pertains to the type of service revolver carried by university officers and the location where they routinely perform their work duties. You argue that release of this information could endanger the officers in the commission of their assigned duties and interfere with enforcement activities. We agree and conclude that you may withhold the information in Tab 11 under section 552.108(b)(1).

The submitted materials also include fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. These new statutes were enacted by the Seventy-seventh Legislature and took effect September 1, 2001. *See* Act of May 24, 2001, 77th Leg., R.S., H.B. 678, § 2 (to be codified as Gov't Code §§ 559.001, .002, and .003). They provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term

includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, the university must withhold the fingerprints in Tab 12 under section 552.101 in conjunction with section 559.003 of the Government Code.

Finally, we note that you seek a previous determination with regard to various information. Therefore, as per your request, this letter ruling shall serve as a previous determination under section 552.301(a) that Texas vehicle identification numbers, license plate numbers and Texas driver's license information pertaining to law enforcement personnel is excepted from public disclosure under section 552.130. *See* Gov't Code § 552.301(a), (f); *see also* Open Records Decision No. 673 (2001). We note, however, that section 552.130 protects the privacy of the individual to whom the information relates. Therefore, a person's section 552.130 information must be released to that person or that person's authorized representative. *See* Gov't Code § 552.023 (person or person's authorized representative has a special right of access to information that is protected by laws intended to protect a person's privacy). Furthermore, section 552.130 does not except from disclosure information that relates to a deceased person.

You also seek a previous determination with regard to information protected by section 552.117(2). In Open Records Decision No. 670 (2001), this office concluded that a governmental body may withhold the home address, home telephone number, personal cellular phone number, personal pager number, social security number, and information that reveals whether the individual has family members, of any individual who meets the definition of "peace officer" set forth in article 2.12 of the Texas Code of Criminal Procedure, pursuant to section 552.117(2) of the Government Code, without first requesting a decision from this office. Therefore, the university may rely on ORD 670 and withhold information under section 552.117(2) without the necessity of seeking an attorney general decision as to that exception.

You also seek a previous determination with respect to officers' fingerprints. Therefore, as per your request, this letter ruling shall serve as a previous determination under section 552.301(a) that fingerprints of university officers are excepted from public disclosure under section 552.101 in conjunction with section 559.003 of the Government Code.

This previous determination applies only to Texas vehicle identification numbers, driver's license information, license plate numbers, and fingerprints of law enforcement personnel requested of the university. *See* Open Records Decision No. 673 at 7 (2001). Moreover, so long as the elements of law, fact, and circumstances do not change so as to no longer support the findings set forth above, the university need not ask for a decision from this office again with respect to this type of information requested of the university. *See id.* With regard to the remainder of the categories of information for which you sought a previous determination, we decline to issue such a determination at this time.

To summarize, the university must withhold the information it has marked in the submitted Tab 4, as well as in Tab 7, pertaining to an officer's home address, home telephone number, social security number, and family information, as well as additional information we have marked, under section 552.117(2). The university must withhold under section 552.119 the photographs depicting peace officers contained in Tab 4. The Texas driver's license number contained in Tab 4 must be withheld under section 552.130. However, the accident report in Tab 6 is confidential under section 552.101. The information we have marked in Tabs 5 and 7 is excepted under section 552.101 and common-law privacy. We have marked the CHRI in Tab 7 that you must withhold pursuant to section 411.083 of the Government Code in conjunction with section 552.101. The university must withhold the identity of the sexual harassment victim from the documents submitted in Tab 8. The university must withhold the marked information in the birth certificate in Tab 10 under section 552.117(2) of the Government Code. The W-4 form in Tab 9 must be withheld under section 552.101 in conjunction with federal law. We have marked additional information in Tab 9 that must be withheld under section 552.101 and common-law privacy. The information in Tab 11 may be withheld under section 552.108(b)(1). The university must withhold the fingerprints in

Tab 12 under section 552.101 in conjunction with section 559.003 of the Government Code. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

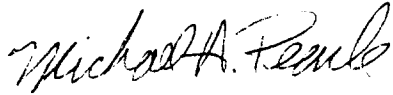
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Michael A. Pearle".

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 157077

Enc. Submitted documents

c: Ms. Kristin Finan
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